No. 21015

United States
COURT OF APPEALS
for the Ninth Circuit

MARYLAND CASUALTY COMPANY,
a Maryland corporation,

Appellant,

v.

CLEAN-RITE MAINTENANCE CO.,
an Oregon corporation,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon

HONORABLE BRUCE R. THOMPSON, District Judge

MAUTZ, SOUTHER, SPAULDING,
KINSEY & WILLIAMSON
JAMES H. BRUCE
12th Floor Standard Plaza, Portland, Oregon 97204
Attorneys for Appellant Maryland Casualty Company

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 8-66

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ARGUMENT

1. Appellant produced substantial evidence presenting a question for jury determination.

Appellee's statement of the case (Br. 2-4) and first argument (Br. 5-6) set forth accepted legal propositions. However, appellee's attempts to mold the facts of this case into support for the District Court's ruling are tortured. Its statement of the case stresses Mr. Hill's

testimony to the exclusion of that of Mrs. Relos. Because the issue on appeal is whether the appellant produced substantial evidence, productive of a jury question, the evidence should be viewed in a light most favorable to the appellant and most strictly against the movant-appellee. *Allister* v. *Knaupp, et al,* 168 Or. 630, 642-643, 126 P.2d 317 (1942). It is uncontested that the testimony of Mr. Hill and Mrs. Relos was diametrically opposed; the numerous factual issues thus formulated should have been considered by the jury.

Appellee's quotation (Br. 6) from Professor Prosser, cited by the Oregon Supreme Court in *Beeler* v. *Collier,* 240 Or. 141, 400 P.2d 541 (1965), seems strangely anachronistic, concerned as it is with circumstantial evidence in a negligence case. A simpler, more appropriate statement of the applicable rule is that the appellant must produce substantial evidence of a contract by the appellee to procure insurance in favor of appellant, and there is insufficient evidence where the jury must speculate. A review of the evidence in this case, as excerpted in appellant's opening brief, indicates the appellant has satisfied its burden.

2. Appellate examination of a contention not considered by the trial court.

Appellee's second argument (Br. 6-7) attempts to justify the unnecessary cluttering of an appellate brief with matters not considered by the trial court, and is a requisite foundation for appellee's third argument concerned with appellant's right to subrogation (Br. 7-10).

The District Court apparently did not rule on, or consider, the "subrogation" argument.

Appellant believes that the availability of a previously unconsidered matter on appeal is a matter of Federal, not Oregon, law; therefore the citation of *Oregon Mutual Fire Insurance Company et al* v. *Mathis,* 215 Or. 218, 334 P.2d 186 (1960) (Br. 7), is interesting but uncontrolling. Whether or not this Court will review matters not considered by the District Court is a consideration of internal appellate procedure, governed by the rules of this Court.

Nevertheless, appellant will comment upon the merits of appellee's "subrogation" argument advanced under this justification, despite doubts as to the propriety of the procedure, in the succeeding section.

3. Appellant had standing to sue as subrogee.

Appellee asserts that appellant had no standing as a subrogee to maintain this action. Appellee's argument on this point is not a model of precision and clarity; apparently appellee believes that appellant does not have "superior equities" and is not entitled to subrogation.

Firstly, in support of its position, appellee relies upon *Newell* v. *Taylor,* 212 Or. 522, 321 P.2d 294 (1958), which states a broad principle as a matter of dicta, and relies upon *American Surety Company* v. *Bank of California,* 133 F.2d 160 (9th Cir. 1943).

In *American Surety Co.,* supra, Interior Warehouse Company was a depositor of the defendant bank. Inte-

rior's bookkeeper, Crowe, fraudulently made checks to improper or nonexistent persons, forged the payees' names, cashed the checks, and converted the funds. He falsified Interior's records to cover his defalcations. American Surety insured Interior against employee infidelity. American Surety paid Interior the amount of loss caused by Crowe's embezzlement and took an assignment of Interior's claims against the Bank. In this action, American Surety sought to recover from the Bank the payments made to Interior. Judgment for the Bank was affirmed by this Court. American Surety contended that the Bank became contractually liable to Interior by charging Interior's account with fraudulently endorsed checks. Appellee avoids citation of the following paragraph, which distinguishes *American Surety Company, supra,* from the instant case, 133 F.2d at 163:

> "The basic principles set forth above are consistently reiterated in connection with the right of subrogation, and are clearly supported by the majority of reported decisions. The cases, dealing with the surety's alleged right of subrogation to the claim of the original creditor against the third party with whom the indemnitor is not in privity, indicate that the result reached depends upon a careful analysis of the facts involved. Obviously, we do not have before us an indemnity agreement running to any person injured, as so often appears in surety contracts of public officials, rather than to specifically named persons. Cases with the turning point as to subrogation correctly or incorrectly resting upon that fact should not be allowed to confuse the situation. The same may be said as to many opin-

> ions to be found in the books which erroneously, as we think, fail to note that the touchstone upon which subrogation, as to parties not under contractual obligations between themselves, depends is the superior equity between the surety and the claimed subrogee."

The *American Surety Co., supra,* decision is clearly inapposite. Appellant has a claim as subrogee because the primarily-liable party was the appellee-obligor under the latter's agreement with the subrogor to procure insurance in favor of the subrogor to protect it in the event of an incident like the Ramsey accident. If appellant's theory is adhered to (and the case was tried on this theory), then *American Surety Co., supra,* is specifically distinguished by its own terms. The present case is concerned with an "indemnity agreement running to an injured person" and a "contractual obligation between the parties."

Secondly, it is difficult to comprehend appellee's contention that the equities preponderate in its favor. How is appellee as an "innocent person" (Br. 8) wronged by another's fraud? Under appellant's theory and proof, appellee secured a valuable contract from appellant's subrogor by an agreement to procure insurance to protect the subrogor. It would be strange, indeed, to allow the appellee to make such a promise, breach the contract, thrust the loss upon the subrogor, and then contest the standing of the subrogee to seek to enforce the contract. Even more bizarre is the instant case where the appellee contends that the trial court was justified in

refusing to submit the factual questions raised to a jury determination.

Assuming, *arguendo,* that appellee's authorities control the instant case, appellee cannot prevail unless it is clear that appellee was not negligent and did not engage in any wrongful act. The evidence in the instant case regarding negligence is sparse; negligence was a collateral issue. It is certainly inferable that the cause of the Ramsey injury was not solely a breach of duty on the part of appellant's subrogor. Ramsey was employed by the appellee, which was presumably expert in the commercial window washing field. There was no showing that the appellant-subrogor (decedent's estate), or its managers (the co-executrices), had any knowledge or expertise regarding the window-washing profession or the state of the building (an estate asset). Ordinarily, when one comes to an existing structure to perform a function as an independent contractor, he is bound to look out for his own safety and he takes the building as he finds it. The failure to do so is negligence which would be causative of the Ramsey harm.

Appellant's subrogor was a landowner. A landowner is not an insurer of safety, even as to the employees of persons working upon the buildings or premises. A landowner need not guard against the mere possibility of accident, but merely should protect against such risks which a reasonably prudent person in the position of landowner would anticipate. *Eberle* v. *Benedictine Sisters of Mt. Angel, et al,* 235 Or. 496, 504, 385 P.2d 765 (1963). (Dissenting opinion.) There is no showing that

Mrs. Relos knew anything of the mechanics of window washing, nor is there evidence that the average landowner or building owner would possess such expertise. It is more likely that Mr. Hill's expertise was the subject of Mrs. Relos' reliance. Moreover, a landowner is not charged with negligence in the failure to discover and remedy hazards on his property which were not discoverable in the exercise of reasonable care. *Stuhr* v. *Berkheimer Co.,* 220 Or. 406, 411, 349 P.2d 665 (1960). There is no evidence that appellant's subrogor knew, or had reason to know, that the Postal Building posed any hazard (if indeed it did) in the window-washing maintenance. After all, Associated Building Maintenance had been washing the Postal Building windows for some time previous to the Ramsey accident, apparently without incident.

Thirdly, it seems to be appellee's contention that appellant is not entitled to subrogation because it was a compensated insurance company and paid the Ramsey claim as a risk encompassed by its policy. This bootstrap argument is also unappealing. A compensated surety, for example, is entitled to the same rights and privileges as a gratuitious surety. *In re Liquidation of Bank of Woodburn,* 149 Or. 649, 655, 42 P.2d 740 (1935); *Fidelity & Deposit Company of Maryland* v. *State Bank of Portland, et al,* 117 Or. 1, 7, 242 P.2d 823 (1926).

Apparently appellee asserts that appellant did not have a superior equity under appellee's concept of subrogation. Appellant contends that appellee contracted to

procure insurance for appellant's subrogor, which insurance would provide primary coverage for occurrences such as the Ramsey incident. Upon failure of the appellee to honor its agreement, appellant, under a much broader policy, was forced to indemnify and defend its subrogor. If appellant is correct in these premises (discussed under Arguments 4 and 5, infra) then it would be "secondarily liable" and appellee "primarily liable" under appellees' own terminology, and appellant would be entitled to subrogation thereunder.

4. Appellant introduced substantial evidence of a contract to procure insurance.

Appellee's fourth argument (Br. 10-16) is labeled "Appellant failed to introduce substantial evidence of a contract of insurance, or the terms of insurance contract to be procured by appellee" (Br. 10). This heading fails to accurately embrace the theory of the case. Appellee continues on appeal to misunderstand (intentionally or unintentionally) appellant's theory of the case. As set forth in appellant's opening brief, appellant does not contend that appellee contracted to insure appellant; therefore, both alternatives in the appellee's "heading" are inapplicable.

Appellant does attach "a great deal of importance to the fact that there must be some arcane distinction between a contract of insurance and a contract to procure insurance" (Br. 10). The Oregon Supreme Court also attaches a great deal of importance to this "mysterious dictinction." To a reader of the recent Oregon decisions, there is no "secret" concerning the distinction.

Apparently appellee is not going to deign to recognize or comment upon the leading case of *Hamacher* v. *Tumy, et al,* 222 Or. 341, 352 P.2d 493 (1960), which is discussed at length in appellants' opening brief. *Hamacher, supra,* controls the determination of this appeal. In fact, appellee refuses to mention the recent case overruled by *Hamacher, supra.* [*Rodgers Insurance Agency* v. *Andersen Machinery,* 211 Or. 459, 316 P.2d 497 (1957)]. Perhaps the distinction which so confounds appellee would be less mysterious if twentieth century authorities were considered.

Appellee asks (Br. 12-13) the amount of coverage to be secured by Mr. Hill. It must be recalled that Mrs. Relos, the executrix of a decedent's estate (appellant's subrogor), was merely a laywoman and unschooled in the law and insurance coverages. Apparently Mr. Hill possessed some competence in insurance coverages since he secured the contract herein by representations concerning insurance protection. The rhetorical question poses a situation realistically treated in *Hamacher* v. *Tumy, supra.* The Oregon Supreme Court in *Hamacher, supra,* determined that when one seeks expert aid in securing coverage, the lay person is assumed to rely upon the expert to procure sufficient coverage under the circumstances. Possibly Mrs. Relos presumed that Mr. Hill would endorse the Postal Building upon the existing contracts of insurance which he had (or claimed he had). Mrs. Relos can hardly be faulted for not possessing expertise in the field of insurance.

Mrs. Relos, on behalf of appellant's subrogor, had

reason to be concerned about the operations of appellee because she testified that she did not have Workmen's Compensation coverage (Tr. 34). Appellee, through Mr. Hill, who had been long associated with the business, well knew what potential exposure could arise from window-cleaning operations.

Appellee seems to believe that a "wide open" risk was born by virtue of Mr. Hill's contract to procure insurance. His "glass on the barge in the Ganges" (Br. 10) example betrays a certain naivete. Appellant asserts (and the evidence shows) that appellee promised to procure insurance to protect its subrogor from liabilities arising out of the operations on the building by the appellee. Therefore, appellee's "parade of horribles" (Br. 10 et seq) is unworthy of comment.

Appellee misconceives the state of the evidence when he asserts:

> "There is not a scintilla of evidence that appellee ever agreed to procure insurance." (Br. 13)

Mrs. Relos testified that Mr. Hill represented that the Postal Building would be fully protected; if appellee did not, in fact, have the requisite insurance, then the evidence clearly supports a finding that appellee agreed to provide insurance for the protection of appellant's subrogor. If Mr. Hill's "puffing" meant that he was telling a falsehood when he claimed and warranted that he was fully insured for Mrs. Relos' protection, then it is appellant's contention that he agreed to procure the insurance he professed to have.

Throughout its brief (e.g. Br. 14) appellee contends

that it was not its "operations" that brought any insurance coverage into play; instead it is asserted that it was the appellant's subrogor's negligence that caused the Ramsey loss. This invalid assumption avoids the central issue in this case. Assuming, *arguendo,* that the appellant's subrogor was negligent, appellant contends that appellee contracted to procure insurance, and if his existing insurance did not cover his agreement, then he agreed to secure further insurance. If a person represents (as appellee admits that Mr. Hill did, Br. 15), that he was "fully insured for your protection," a lay person such as Mrs. Relos would normally assume that the Postal Building would be protected for those operations performed in and about the building by Mr. Hill and his employees.

Appellee claims (Br. 15) that Mr. Hill pointed out (after the fact) that he could not insure a third party for negligence on its part. This erroneous legal conclusion strictly avoids the vital issue. All insurance policies are indemnification agreements against carelessness or negligence on the part of the "indemnitee." Appellant contends that appellee contracted to procure sufficient insurance to protect appellant's subrogor during appellee's operations. Failure to do so breached the contract, and is the foundation of this lawsuit.

Appellee makes much of the fact that Mrs. Relos, on behalf of the Postal Building, had an existing public liability policy with appellant (Br. 15). Appellant's policy provided a different type of coverage than that promised by Mr. Hill; it would not prorate under the

Lamb-Weston theory (which is restricted to automobile coverages) and appellant's coverage was merely secondarily liable. Appellee's agreement here again indicates the curious confusion between indemnity agreements and agreements *to procure* insurance coverage. Moreover, Mrs. Relos testified that she was particularly concerned about the promised coverage because the Postal Building did not have Workmen's Compensation coverage (Tr. 34).

Appellee argues that the difference in cost between appellee's agreement and that charged by the prior window washer was attributable to the annual cleaning of Mrs. Relos' windows at home. There is no evidence to support this conclusion. Most likely the same agreement pertained as to the annual home window washing.

The conclusion of the fourth argument of appellee is incomprehensible, perhaps because appellant and appellee are considering different theories. This case is controlled by *Hamacher* v. *Tumy, supra,* which appellee refuses to recognize or discuss. Appellee agreed to procure insurance for the protection of appellant's subrogor; appellee breached this agreement and caused appellant's subrogor harm, for which recovery is sought.

5. The "indemnity" argument.

Instead of considering the theory upon which the case was tried, Argument 4, supra, appellee becomes needlessly perturbed and confused with problems emanating from indemnity agreements which indemnify an indemnitee for the consequences of his own negligence (Br. 16-20).

Appellant is not suing on a contract of indemnity. Appellant is suing on a breach of contract by appellee to procure insurance to protect appellant's subrogor from harm flowing from the appellees' operations in and about appellant's subrogor's building. Insurance always protects parties from the consequences of their own negligence. That is the purpose of insurance. An insurance policy is but a method of funding the consequences of one's own negligent acts; it is not a "hold harmless agreement" but rather is a fund to protect against potential liability and allocate losses. Appellant does not contend that appellee agreed to "hold appellant's subrogor harmless"; rather, appellee agreed to put at the disposal of the appellant's subrogor a fund to provide this limited protection. To argue that Mrs. Relos was barred because she did not use the words "hold harmless" (Br. 17) verges on sophistry.

Even assuming that discussion should be directed to indemnity agreements which indemnify for the consequences of one's own negligence, the governing recent Oregon authorities recognize that a party may be indemnified for the consequences of his own negligence. *Unitec Corporation* v. *Beatty Safway Scaffold Co.*, 358 F.2d 470 (9th Cir. 1966); *Southern Pacific Company* v. *Morrison-Knudsen Company,* 216 Or. 398, 338 P.2d 665 (1959); *Irish & Swartz Stores* v. *First National Bank of Eugene,* 220 Or. 362, 349 P.2d 814 (1960) (bailment).

Appellee would distinguish *Unitec Corporation, supra,* on the ground that the contract there considered in-

cluded an agreement to procure a policy of liability insurance (Br. 19). Appellant does not believe that this Court would have reached a different result in *Unitec Corporation, supra,* had the procurement of insurance clause been absent. 358 F.2d at 479. Why did the proposal submitted as a self-serving statement after the fact by Mr. Hill contain no customary hold harmless agreement? Obviously the insurance clause had been intended as a substitute for the hold harmless agreement.

Again assuming appellee's inaccurate major premise for sake of argument, is it reasonable to conclude in this case that the appellant's subrogor was solely negligent and solely caused Ramsey's injury? Appellant thinks not; it is likely that the Postal Building was not negligent at all and that the appellee's employee could have been protected by the use of jacks, by proper examination and inspection of the premises, and by general lookout for his own safety. The appellee held itself out as an expert in the field of window washing and should be bound by its "puffing" and asserted expertise.

A most interesting admission appears in appellee's brief:

> "All we have in this case is some 'puffing' by Mr. Hill that he had a full insurance program available. Indeed he had, * * *." (Br. 20)

Leaving aside any distinction between puffing and prevarication, apparently appellee admits that they had a full insurance program available that coincided with the "puffing" statement; if so, why was there allegedly no coverage for appellant's subrogor?

CONCLUSION

Appellant produced substantial evidence to require a jury determination upon the existence and terms of the contract to procure insurance in its favor by appellee. A factual controversy was presented which should have been passed upon by the triers of fact and should not have been removed from them by the direction of the verdict.

Appellee's three hurdles disappear when this case is considered in its proper perspective. Appellee's authority for its contention that appellant is not entitled to subrogation is inapposite. Appellee misunderstands appellant's theory of recovery and refuses to limit the discussion to *contracts to procure insurance.* The second and third "hurdles" become needlessly and hopelessly confused with talk in terms of "indemnity" and "hold harmless" agreements. Appellant contends that appellee contracted to procure a contract of insurance which would protect appellant from the consequences of the operations by appellee in and about the Postal Building. To this extent, an "indemnity agreement" was involved, since *insurance contracts always involve an "indemnity agreement" between insurer and insured.* Appellant was damaged by appellee's breach of this contract to procure and provide insurance, and appellee should respond in damages.

Respectfully submitted,

MAUTZ, SOUTHER, SPAULDING, KINSEY
& WILLIAMSON
JAMES H. BRUCE
Attorneys for Appellant
Maryland Casualty Company

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

JAMES H. BRUCE
Of Attorneys for Appellant